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No. 16-5194

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA HOLMES AND PAUL JOST,
Plaintiffs/Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant/Appellee.

On certification by the United States District Court for the District of Columbia under 52 U.S.C. § 30110

Plaintiffs' Opening Brief

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs Laura Holmes and Paul Jost submit their Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

Plaintiffs Laura Holmes and Paul Jost appeared against Defendant Federal Election Commission ("FEC" or "Commission") before the United States District Court for the District of Columbia.[1] No person filed as *amicus curiae* before the district court.

B. Rulings Under Review

Under 52 U.S.C. § 30110, this Court sitting en banc considers the constitutional question at issue in the first instance. The United States District Court for the District of Columbia certified the constitutional question on June 29, 2016, pursuant to an order of this Court. *See* Amended Order, JA 197, *Holmes v. FEC*, No. 14-cv-1243-RMC (D.D.C. June 29, 2016), ECF No. 42. The District Court previously made findings of fact that it incorporated into its Amended Order. *See Id*. (citing *Holmes v. FEC*, 99 F. Supp. 3d 123, 126-36 (D.D.C. 2015), reproduced at JA 142-159).

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[1] Because there has been no merits determination concerning Plaintiffs' claims, this case does not present a true appeal. Consequently, this brief will refer to Laura Holmes and Paul Jost as "Plaintiffs" and the Federal Election Commission as the "Defendant."

C. Related Cases

Plaintiffs are unaware of any related cases.

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GLOSSARY OF ABBREVIATIONS

BCRA: Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)

FEC or Commission: Federal Election Commission

FECA: Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972), the Federal Election Campaign Act of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974), and Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, 90 Stat. 475 (1976).

JA: Joint Appendix

STATEMENT OF JURISDICTION

The district court had jurisdiction to make findings of fact and certify constitutional questions to this Court, sitting en banc, pursuant to 28 U.S.C. § 1331 and 52 U.S.C. § 30110. Plaintiffs properly invoked 52 U.S.C. § 30110 because they are eligible to vote in an election for the office of President of the United States. The district court made findings of fact on April 20, 2015, *see* JA-142 to 159, and certified the question of constitutionality on June 29, 2016, *see* JA-197. This Court, sitting en banc, has exclusive jurisdiction to hear the constitutional question certified. *See* 52 U.S.C. § 30110; *Wagner v. FEC*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) ("*Wagner I*").

STATEMENT OF ISSUES

Congress and the Supreme Court have concluded that there is no risk of *quid pro quo* corruption where a party's nominee, having won a primary election, receives up to $5,200 from a single donor by the end of the general election period. Is the Federal Election Campaign Act ("FECA") closely drawn to the prevention of *quid pro quo* corruption where it forces contributors to the party nominee to give at least half of that $5,200 during the primary election period, rather than in full during the general election period?

STATUTES AND REGULATIONS

The pertinent statutes and regulations related to this case are as follows:

When used in [the Federal Campaign Election] Act:

(1) The term "election" means—

(A) a general, special, primary, or runoff election;

52 U.S.C. § 30101(1)(A)

* * *

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of [the Federal Election Campaign] Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

52 U.S.C. § 30110.

* * *

(a) **Dollar limits on contributions**

(1) Except as provided in subsection (i) and section [30117] of this title, no person shall make contributions

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

. . .

> (6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.
>
> . . .

52 U.S.C. §§ 30116(a).

* * *

In order to keep pace with inflation, and consistent with the Act, the $2,000 contribution limit was adjusted to $2,600 before the 2014 general election. *See* FEC Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013).

* * *

> (3)
>
> (i) A contribution designated in writing for a particular election, but made after that election, shall be made only to the extent that the contribution does not exceed net debts outstanding from such election.
>
> . . .
>
> (5)
>
> . . .
>
> (ii)
>
> . . .

> (B) Notwithstanding paragraph (b)(5)(ii)(A) of this section or any other provision of this section, the treasurer of the recipient authorized political committee may treat all or part of the amount of the contribution that exceeds the contribution limits in paragraph (b)(1) of this section as made with respect to the general election, provided that:
>
> > (1) The contribution was made before the primary election;
> >
> > . . .
> >
> > (4) Such redesignation would not cause the contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section;
> >
> > . . .
>
> (C) Notwithstanding paragraph (b)(5)(ii)(A) of this section or any other provision of this section, the treasurer of the recipient authorized political committee may treat all or part of the amount of the contribution that exceeds the contribution limits in paragraph (b)(1) of this section as made with respect to the primary election . . .

11 C.F.R. § 110.1(b)

* * *

> (c) Permissible Transfers. The contribution limitations of 11 CFR 110.1 and 110.2 shall not limit the transfers set forth below in 11 CFR 110.3(c) (1) through (6) -

> . . .
>
> (3) Transfers of funds between the primary campaign and general election campaign of a candidate of funds unused for the primary;

11 C.F.R. § 110.3(c)(3).

STATEMENT OF THE CASE

Plaintiffs Laura Holmes and Paul Jost are a married couple residing in Miami, Florida. JA-142, ¶ 1. Each wished to associate with a candidate in the 2014 general election by making campaign contributions. JA-157, ¶ 61; JA-158, ¶ 70; *see McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) (Roberts, C.J., controlling opinion)[3] (noting that, "[w]hen an individual contributes money to a candidate, he exercises both" the right of political expression and the right of political association). Ms. Holmes contributed $2,600 to Carl DeMaio, a general election candidate for California's 52nd Congressional district. JA-158, ¶ 67; JA-13, ¶ 21. Mr. Jost likewise contributed $2,600 to Dr. Mariannette Miller-Meeks, a general election candidate for Iowa's 2nd Congressional district. JA-159, ¶ 74; JA-14, ¶ 24. Neither plaintiff gave to either candidate during the primary election; instead, each wished to give $5,200 to their party's general-election nominee. JA-158, ¶ 68; *id*. at 159, ¶ 75. Federal law denied them that opportunity.

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[3] The Chief Justice authored an opinion for himself and three other justices; Justice Thomas concurred in the judgment, but wrote separately to argue that *Buckley v. Valeo* ought to be overruled and contribution limits declared unconstitutional. *McCutcheon*, 134 S. Ct. at 1462-63 (Thomas, J., concurring). The Chief Justice's opinion is controlling because it provides the "narrowest grounds" for the judgment. *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). All future citations to *McCutcheon* are to the controlling opinion, unless otherwise noted.

Neither Plaintiff disputes Congress's authority to set limits on contributions to federal candidates in order to prevent *quid pro quo* corruption or its appearance. Both defer to Congress's decision to set this limit at $5,200 for a candidate who wins her party's nomination and advances to the general election.[4] This case challenges only the *manner* in which an individual must give this non-corrupting contribution. 52 U.S.C. § 30101(1)(A); *see* 52 U.S.C. § 30116(a)(6) ("the limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election . . . ").

Defendant Federal Election Commission ("FEC" or "Commission") enforces this divided limit. 52 U.S.C. § 30106(b)(1). The Commission allows individuals to write a single check for $5,200 during the primary season—where the entire amount may be used for the general election, *see* 11 C.F.R. §§ 110.1(b)(5)(ii)(B) and

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[4] Originally set at $2,000 ($1,000 for the primary and $1,000 for the general election), the limit was doubled by Congress in 2002 and indexed for inflation. JA-144, ¶ 6; 52 U.S.C. §§ 30116(a)(1)(A), (c); JA-145, ¶ 9. When this case was originally filed, the limit was $5,200, reflecting the limits for the primary- and general-election periods. Although Congress intended § 30110 cases to be heard quickly, sufficient time has passed for the relevant limit to rise to $5,400. JA-145, ¶ 10. To maintain consistency with the record and prior briefing, Plaintiffs will use the earlier, $5,200 limit throughout this brief.

110.3(c)(3); they are free to write a single check for $5,200 during the general election season if part is specifically earmarked for primary period debts, *see* 11 C.F.R. § 110.1(b)(3)(i); and they are free to give $2,600 during the primary election and a second $2,600 during the general election—where the entire $5,200 may be used for the general election, *see* 11 C.F.R. § 110.3(c)(3).

But it is unlawful for a contributor to wait until the general election period before making any contribution at all, and to then write a check for $5,200.[5] Consequently, the contributor who does not want to see her contribution squandered during the intra-party fight of a primary election, or who simply wishes to fully associate with her party's ultimate nominee, is limited to giving only half of the overall amount Congress has determined to be non-corrupting—only $2,600.

Plaintiffs brought suit on July 21, 2014, seeking injunctive relief that would permit them to contribute a full, non-corrupting $5,200 in two specific races. The district court denied Plaintiffs' motion for a preliminary injunction, but it nonetheless certified facts and questions of constitutionality to this Court on November 17, 2014. JA-58 to 59. The FEC moved to remand the case on January 2, 2015, arguing that it had not been given the opportunity to fully develop a factual record, and that the district court had consequently denied it due process. FEC Motion for Remand at 17-20, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 2, 2015), ECF No. 1529989. This Court granted that motion on January 30, 2015. JA-60.

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[5] This is true even though it is perfectly legal for the same contributor to write a check for $5,200 the day before the primary election, knowing that the entire amount will be used during the general election.

On remand, the district court made findings of fact, JA-142 to 159, but declined to again certify the questions of constitutionality to this Court, JA-181. This Court reversed that decision, in part, on April 26, 2016, relying on the Supreme Court's ruling in *Shapiro v. McManus*, 136 S. Ct. 450 (2015). *Holmes v. FEC*, 823 F.3d 69 (D.C. Cir. 2016), JA-184 to 196. Accordingly, on June 29, 2016, the district court certified Plaintiffs' First Amendment question to this Court, sitting en banc. JA-197.

SUMMARY OF THE ARGUMENT

As things stand today, an individual may write a $5,200 check to a general-election candidate for Congress, so long as she does so before the primary election. If that same contributor decides to give the day *after* the primary, once her preferred party has definitively selected a nominee, and even if she contributed nothing during the primary-election period, she may only give $2,600.

Laura Holmes and Paul Jost both wished to give full, non-corrupting $5,200 contributions to particular candidates who had won the Republican nomination for Congress, and to do so entirely during the general-election period. But they could not, because doing so is illegal under FECA, even though neither Plaintiff contributed anything at all during the primary-election period.

This case is directed only to those circumstances. Plaintiffs concede the constitutionality of contribution limits generally, and they have no quarrel with FECA limiting primary-election contributions to $2,600, nor with its overall $5,200 cap on contributions to general-election candidates. It is the division of that limit—in such a way as to halve Plaintiffs' associational freedoms when they choose to wait until after a primary contest has concluded before supporting a candidate for office—that is at issue, and nothing more.

The FEC cannot show that this limitation does anything to fight *quid pro quo* corruption or its appearance, because it does not. In fact, there is no indication that Plaintiffs' predicament even occurred to Congress. FECA's decision to structure non-corrupting contributions in this manner, then, is at best a prophylaxis-upon-prophylaxis regulatory approach that illegitimately burdens freedom of expression and association in these circumstances. Accordingly, under longstanding Supreme Court precedent going back forty years, and most recently reaffirmed in *McCutcheon*, 134 S. Ct. at 1441, FECA's per-election division of non-corrupting contributions violates the First Amendment.

ARGUMENT

I. STANDARD OF REVIEW AND CONSTITUTIONAL SCRUTINY

A. De Novo Review Under § 30110

Under 52 U.S.C. § 30110, the district court must "certify all questions of constitutionality of [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." 52 U.S.C. § 30110. This Court determines the constitutionality of those questions in the first instance, and considers the issue "*de novo*." *Republican Nat'l Comm. v. FEC* (*In re Anh Cao*), 619 F.3d 410, 415 (5th Cir. 2010).[6]

[6] The district court has three functions in § 30110 cases: It must (1) "develop a record for appellate review by making findings of fact"; (2) "determine whether the constitutional challenges are frivolous or involve settled legal questions"; and (3) "immediately certify the record and all non-frivolous constitutional questions" for this Court's decision. *Wagner I*, 717 F.3d at 1009. When this case was previously certified to this Court, the FEC complained that the case had not been certified with a full factual record, although it failed to point to any information it wished to present, or any information this Court would require in order to answer the certified questions. FEC Motion for Remand at 17-20, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 2, 2015), ECF No. 1529989. Based on the FEC's representations, this Court remanded the case to "develop . . . the factual record necessary for en banc review." JA-60. In an effort "to be overinclusive rather than underinclusive," the district court in its findings of fact "included the majority of FEC's proposed facts," "omitt[ing] or modif[ying only those] proposed finding[s] of fact that [were] argumentative or drew legal conclusions." JA-140 to 141.

The courts have not addressed the standard of review applied to the district court's findings of fact in § 30110 cases. This Court generally reviews findings of fact for clear error. *See, e.g.*, *United States v. Weaver*, 808 F.3d 26, 32 (D.C. Cir. 2015);

B. The FEC Must Demonstrate that FECA's Burdens Are Closely Drawn to the Government's Interest

Because the law at issue here infringes on fundamental liberties, the FEC bears the burden of persuasion, and it must prove that FECA, in this application, survives heightened constitutional scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *McCutcheon*, 134 S. Ct. at 1444 (noting that this is "an area of the most fundamental First Amendment activities" (quoting *Buckley*, 424 U.S. at 14)). Contribution limits are not subject to strict scrutiny, as are complete bans on political speech. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Wagner v. FEC*, 793 F.3d 1, 5 (D.C. Cir. 2015) ("*Wagner II*"). Nevertheless, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley*, 424 U.S. at 25; *cf. FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

For FECA to pass such scrutiny, as applied to Plaintiffs, the FEC must "demonstrate[] a sufficiently important interest and [show that the law] employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (internal quotation marks omitted). This "closely drawn" test requires that this Court "assess the fit between the stated governmental

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Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312, 316 (D.C. Cir. 2015).

objective and the means selected to achieve that objective." *Id*. at 1445. In this case, that standard demands that the FEC demonstrate that the bifurcated limit is a means that is "closely drawn" to a "sufficiently important interest." *Id*. at 1444;[7] *see also McConnell v. FEC*, 540 U.S. 93, 231-32 (2003) ("When the Government burdens the right to contribute, we apply heightened scrutiny. . . . We ask whether . . . the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms.").

Plaintiffs here do not ask whether the Government can impose contribution limits at all, and they do not challenge the specific dollar amount Congress has chosen, both issues the Supreme Court has already addressed. *See Wagner II*, 793 F.3d at 5-6 n. 3 (compiling cases addressing contribution limits under closely drawn standard).[8] Rather, Plaintiffs challenge only the manner in which the total amount of money that Congress has said will not corrupt a candidate is split between the primary and general elections.

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[7] As discussed below, the only interest available to the FEC is the prevention of "*quid pro quo* corruption or its appearance." *See McCutcheon*, 134 S. Ct. at 1445.

[8] Plaintiffs note that greater judicial deference may be appropriate when reviewing the dollar amount of contribution limits, both because the Supreme Court has previously considered the constitutionality of particular limits and because of the empirical judgments involved in setting particular limits. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (Breyer, J., plurality op.) ("In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office." (internal quotation marks omitted)); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) (noting that "the dollar amount of the limit need not be 'fine tuned'" (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000))); *cf. Davis v. FEC*, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the

As this Court recognized in reversing the district court's denial of certification, this case raises a novel question. *See* JA-193. In *Buckley*'s review of FECA's contribution limits, the Justices "mentioned the 'per-election' structure only a handful of times," despite penning the "more than 200 pages of the majority opinion and dissents," and then only "to 'summarize[]' or define the contribution limits." *Id*. Similarly, "[i]n nearly 800 pages of briefs," the bifurcated limits were "mentioned only" to summarize or define the limits. *Id*. And, "[o]f the 28 constitutional questions" certified in *Buckley*, "none touched upon the subject." *Id*. Indeed, in no opinion has any court gone beyond "the three sentences" the *Buckley* court spent analyzing FECA's aggregate limits, an analysis so "superficial" that *Buckley* did not control. JA-194.

Thus, this case raises a novel question, and the FEC must therefore bear the full weight of heightened scrutiny and demonstrate with particularity that FECA's bifurcation provisions are constitutional as applied to Plaintiffs' specific circumstances. *Shrink Mo.*, 528 U.S. at 391 ("The quantum of empirical evidence" the government must provide "to satisfy heightened judicial scrutiny of legislative

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judgment of the legislative body that enacted the law."). "But [the Supreme Court has] held that limits that are too low cannot stand." *Davis*, 554 U.S. at 737.

judgments will vary up or down with the novelty and plausibility of the justification" the government gives for a law).[9]

C. FECA Must Be Tailored to Limit True *Quid Pro Quo* Corruption or Its Appearance

"There is no right more basic in our democracy than the right to participate in electing our political leaders," and "[t]he right to participate . . . through political contributions is [therefore] protected by the First Amendment." *McCutcheon*, 134 S. Ct. at 1440-41. Because of the importance of this basic right, the Supreme Court has "identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *Id*. at 1450. And this anticorruption interest must target, in particular, "what [the Supreme Court has] called '*quid pro quo*' corruption or its appearance." *Id*. at 1441.

[9] By contrast, the plaintiffs in *Shrink Missouri* did not raise a novel challenge. They challenged whether the state could constitutionally impose contribution limits at all, as well as whether Missouri's particular limits were set at an appropriate level. *See Shrink Mo.*, 528 U.S. at 390-91. But the Supreme Court in *Buckley* had already upheld a similar law against a similar challenge where a government asserted similar justifications. Thus, the state could rely on evidence and studies used in *Buckley* to justify its analogous law. *Id*. at 391-92, 393, 393 n. 6. And because those plaintiffs had not "made any showing . . . to cast doubt on the apparent implications of [the] evidence and the record" in the previous case, the state was not required to provide additional, "extensive evidentiary documentation" to protect its law. *Id*. at 394. Here, as this Court has already recognized, there is no similar congruence with *Buckley* (or any other authority), and the FEC must bear the full burden of heightened constitutional scrutiny.

This narrow interest requires that the government restrain itself from treating "nearly anything a public official accepts . . . as a *quid*; and nearly anything a public official does . . . as a *quo*." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (rejecting expansive view of *quid pro quo*). Thus, in protecting against such corruption or its appearance, the Government "may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *McCutcheon*, 134 S. Ct. at 1441. In particular, the Government cannot adopt and enforce laws in a way that would "cast a pall of potential prosecution over these relationships," including by making "citizens with legitimate concerns . . . shrink from participating in democratic discourse." *McDonnell*, 136 S. Ct. at 2372.

In short, courts have a duty to carefully guard against overreaching interpretations of the anticorruption interest, and "[a]ny regulation [justified under the anticorruption interest] must . . . target [the] direct exchange of an official act for money," i.e., "dollars for political favors." *McCutcheon*, 134 S. Ct. at 1441 (citation omitted); *see also* JA-188 to 189. When the Government attempts to regulate political association, and targets its efforts beyond this narrow understanding of *quid pro quo* corruption, it "impermissibly inject[s itself] 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 134 S. Ct. at 1441 (citation omitted) (emphasis in original).

A correct understanding of the government's legitimate interest is necessary, but insufficient. Governmental efforts to effectuate that interest must also be "closely drawn" to avoid unnecessary infringement on constitutional liberties. *Id*. at 1444. After all, "[i]n the First Amendment context, fit matters." *Id.* at 1456. In assessing that fit, this Court must demand more than "mere conjecture," *Shrink Mo.*, 528 U.S. at 392, and the FEC must "show a real risk of corruption" under the facts of this case, rather than relying on general statements, facial precedents, or other authority dealing generally with contribution limits in very different circumstances. *Id*.; *see also Buckley*, 424 U.S. at 28 (upholding contribution limit that "focuse[d] precisely on . . . the narrow aspect of political association where the actuality and potential for corruption have been identified").

In short, unless the Government can demonstrate that FECA's bifurcated system of contribution limits is targeted toward a risk of corruption that is not already addressed by the contribution limits in general, the law is not closely drawn, and it unconstitutionally "intrude[s] without justification on a citizen's ability to exercise the most fundamental First Amendment activities." *McCutcheon*, 134 S. Ct. at 1462 (internal quotation marks omitted); *cf*. *Wagner II*, 793 F.3d at 17 n. 20 (noting that the Sixth Circuit overturned a law banning prosecutors from accepting contributions from Medicaid providers, because the state produced no evidence that the law prevented corruption among prosecutors (citing *Lavin v. Husted*, 689 F.3d 543, 547 (6th Cir. 2012)).

II. FECA VIOLATES PLAINTIFFS' FIRST AMENDMENT ASSOCIATIONAL RIGHTS

The Supreme Court has "identified only one legitimate governmental interest for restricting" our "right to participate in electing our political leaders . . . through political contributions." *McCutcheon*, 134 S. Ct. at 1441, 1450. That interest is "preventing corruption or the appearance of corruption." *Id*. at 1450.[10]

In addressing the anticorruption interest, the relevant yardstick is the total amount of money a candidate has received. This is common sense. It is also the approach taken by the Supreme Court, which has discussed the *total* limit on an individual's contributions when analyzing constitutional questions related to the base limits. *See, e.g.*, *id*. at 1448 ("[t]he individual may give up to $5,200"); *id*. at 1452 ("Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption"). And if the Supreme Court's approach is correct in looking to the total amount contributed, then there should be no greater risk of corruption if a donor gives that full amount the day after the primary, rather than half the day before. Congress has nevertheless created a bifurcated system that arbitrarily bans contributions in the former case.

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[10] Before noting that it had approved only the anticorruption interest, the Supreme Court briefly mused that the Government might have attempted to defend the additional, aggregate limits on donations across candidates by appeal to the circumvention interest. *See McCutcheon*, 134 S. Ct. at 1452 ("And if there is no risk that . . . candidates will be corrupted by donations of up to $5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits."). The Supreme Court found only the anticorruption interest sufficient to justify the infringement upon associational rights implicit in contribution limits. *Id*. at 1450. Here, even if the anti-circumvention interest could sustain the bifurcated contribution limits, the Government has neither argued that the bifurcated limits are sustained by the anti-circumvention interest nor demonstrated that those limits are closely drawn to that interest. Nor has it suggested any other valid, let alone substantial, governmental interest.

Ms. Holmes and Mr. Jost do not ask that the Court overturn FECA, the existence of campaign contribution limits, or the specific contribution thresholds. They simply want to associate fully with their preferred candidate—the party nominee—by making a full, non-corrupting donation after the primary election. The FEC has failed to demonstrate that this poses any risk of corruption, or that the bifurcation of donor contributions meets the requirements of heightened scrutiny.

A. The Bifurcated Contribution Limits Are Not Closely Drawn to the Anticorruption Interest

Plaintiffs concede that the prevention of corruption, correctly understood, is a compelling—indeed vital—governmental function. But Congress does not have limitless discretion in tackling that danger, and the FEC has failed to demonstrate that the bifurcated limit is "closely drawn" to that interest. *Id*. at 1444-46.

1. The relevant base limit is $5,200.

Congress has determined, and the Supreme Court has acknowledged, that the relevant base limit here is $5,200. *Id.* at 1452. Indeed, the existence of this underlying $5,200 base limit was central to the controlling opinion, and discussed by the dissenters, in *McCutcheon*'s review of additional, aggregate limits across candidates. This was no oversight or shorthand: the *McCutcheon* Court was well aware that FECA divided the total amount that is non-corrupting into "base limits [that] permit an individual to contribute up to $2,600 per election to a candidate ($5,200 total for the primary and general elections)." *Id.* at 1442.

In determining whether the aggregate limits were closely drawn to the anticorruption interest, the Supreme Court consistently focused on the total $5,200 that can be donated to a candidate who has won a primary election. *See, e.g.*, *id.* at 1448, 1451, 1452; *id.* at 1473, 1474, 1476 (Breyer, J., dissenting). It explicitly stated that Congress selected the "$5,200 base limit" because it believed that amount was sufficient to prevent the risks of *quid pro quo* corruption. *Id.* at 1452. And, working at the $5,200 level, the Court could find no basis for believing the aggregate limits were tailored to the anticorruption interest. *See id.* at 1452-56. Consequently, the *McCutcheon* Court held that the aggregate limits were an unconstitutional prophylaxis layered atop the prophylaxis already provided by the base limit. *Id.* at 1458, 1462.

The Court's analysis follows from the common-sense recognition that it is the total amount received by a candidate that signals whether there is a risk of corruption. If, on the other hand, it were the individual, per-election limits that were relevant to the anticorruption interest, the *McCutcheon* Court would have conducted its analysis at the per-election level. It did not.

Nor is the Supreme Court alone in recognizing the common-sense truth that party nominees are subject to a $5,200 limit. After all, there is little point to winning a primary alone; the purpose of an election is to win office, and candidates begin raising money for both from the start, as they are allowed to do. *See, e.g.*, 11 C.F.R. § 110.1(b)(5)(ii)(B) (permitting single check for $5,200 during primary to begin covering general election expenses); Tim Higgins, *Presidential Fundraising: See Who's Spending, Who's Lagging, Who's Raising and Where*, Bloomberg, July 16, 2015, at http://www.bloomberg.com/politics/articles/2015-07-16/presidential-campaign-finance-reports-a-data-visualization (noting that "contributors have not maxed out their $5,400 legal limit").

"Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption," *McCutcheon*, 134 S. Ct. at 1452. Plaintiffs only wish to contribute at that level, and the FEC has failed to show any *quid pro quo* corruption that FECA's bifurcated limits target in Plaintiffs' circumstances. This alone is fatal to the FEC's defense.

2. The FEC has not shown any relationship between the bifurcated contribution limits and the anticorruption interest

Even if the FEC had shown a risk of *quid pro quo* corruption targeted by FECA's bifurcated limits, it has failed to show a relationship between the law's burdens and that risk. This is an as-applied challenge limited to FECA's application to a particular type of general-election contribution, and it is the FEC's burden to show that the law is closely drawn to the anticorruption interest in that circumstance. *Id*. at 1452 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." (internal quotation marks omitted)). It has not done so.

First, the Commission cannot rely on any prior case because there is no prior case addressing the constitutionality of a law bifurcating contribution limits. *Cf. Shrink Missouri*, 528 U.S. at 391-93, 393 n. 6 (noting that a government can rely on the evidence and studies of other entities addressing *the same issue*). In particular, the *Buckley* Court's rejection of a facial challenge to the very existence of contribution limits does not support the Commission. As the Supreme Court has stated, its "rejection of [a] plaintiffs' facial challenge to [a] requirement . . . does not foreclose possible future challenges to particular applications of that requirement." *McConnell*, 540 U.S. at 199; *see also Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-412 (2006) ("*WRTL I*") ("In upholding [a statute] against a facial challenge, we did not purport to resolve future as-applied challenges.").[11]

Thus, the FEC must demonstrate that the specific, as-applied question raised here was at issue in *Buckley*'s facial challenge. This it cannot do, because, as this Court has already held in this very case, FECA's "'per-election' structure" was mentioned "only a handful of times" in *Buckley* for the "limited purpose" of "'summariz[ing]' or defin[ing] the contribution limits provision," and even those limited references had to be found throughout “200 pages of the majority opinion and dissents” and “nearly 800 pages of briefs.” JA-193. Moreover, none “[o]f the 28 constitutional questions the district court certified . . . touched upon the subject” of the limit bifurcation. *Id*.

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[11] Furthermore, the *Buckley* Court applied a different standard of review. *Buckley* dealt with a facial challenge to FECA, *Buckley*, 424 U.S. at 35, rather than an as-applied challenge to the bifurcated structure of the contribution limits. Courts have a "preference for as-applied review," *United States v. Farhane*, 634 F.3d 127, 138 (2d Cir. 2001), because facial challenges "mount[] gratuitous wholesale attacks upon state and federal laws" rather than confining themselves to "the plaintiff's own right not to be bound by a statute," *Bd. of Trs. v. Fox*, 492 U.S. 469, 485 (1989). *Cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Consequently, the Supreme Court forces those making facial challenges to "shoulder [a] heavy burden to demonstrate that [a law] is 'facially' unconstitutional," making it "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

By contrast, as-applied challenges invalidate a law only under the plaintiff's specific circumstances, leaving other potentially constitutional applications in place. *See e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking down campaign finance statute as-applied). Furthermore, in cases where fundamental rights like those at issue here are involved, *the government* must bear the burden of showing that the law passes heightened scrutiny. *See McCutcheon*, 134 S. Ct. at 1444. And because the Supreme Court has created such a high standard for facial challenges to encourage parties to seek the more limited relief of as-applied challenges, the government cannot simply point to the denial of a facial challenge to say that an as-applied challenge is foreclosed. *Cf. WRTL I*, 546 U.S. at 411-12 ("In upholding [a statute] against a facial challenge, we did not purport to resolve future as-applied challenges.").

Thus, lacking any precedent dealing with bifurcated limits, including any record from such a case, the FEC must rely entirely on the evidence it has produced here. *Cf. Shrink Mo.*, 528 U.S. at 393. But this too falls short. The Commission proposed numerous legislative and other facts, which the District Court adopted almost in their entirety. JA-142 to 146. These facts exhaustively relate the history of campaign finance regulation and the reasons Congress had for adopting contribution limits. In all of that, however, there is nothing demonstrating that giving $5,200 is any more corrupting when the total is given a day after the primary election than when half is given the day before. Nor are any of the Commission’s legislative facts, all of which address the concept of contribution limits at a very high level of abstraction, applicable to this as-applied challenge. *Id*.

On the contrary, even though Plaintiffs do not bear the burden here, evidence shows widespread recognition that donating a single check for $5,200 is not corrupting. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1452 (noting that “Congress’s selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption”); *cf.* 11 C.F.R.

§ 110.1(b)(5)(ii)(B) (permitting single check before the primary for up to the total limit for the primary and general elections); 11 C.F.R. § 110.1(b)(3)(i) (permitting single check for $5,200 after the primary, although permitting funds earmarked for the primary period to be used only to retire outstanding debts).

Thus, the FEC cannot meet its burden, and has failed to demonstrate that making the total permitted donation of $5,200 during the general election campaign would lead to *quid pro quo* corruption. It has therefore failed to show that the bifurcated contribution scheme is closely drawn to the government's anticorruption interest. Rather, like the unconstitutional aggregate limits at issue in *McCutcheon*, the bifurcated limits are "layered on top" of base limits that themselves do not directly combat corruption, but only keep it at a greater distance. 134 S. Ct. at 1458.[12] The Supreme Court has repeatedly held, however, that such a "'prophylaxis-upon-prophylaxis approach' requires that [courts] be particularly diligent in scrutinizing the law's fit." *Id*. at 1458 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) ("*WRTL II*") (opinion of Roberts, C. J.)).

[12] In *McCutcheon*, the Supreme Court noted that the aggregate limits were layered on top "ostensibly" to help fight circumvention of the base limits. 134 S. Ct. at 1458; *see also, e.g.*, *id*. at 1442 (noting FEC arguments that aggregate limits are necessary to prevent circumvention). The Supreme Court then noted "multiple alternatives available" to prevent the potential of circumvention occurring in the way the FEC had argued. *Id*. at 1458. Here, the FEC has not even indicated a way in which the bifurcated limits might help further the anti-circumvention or any other interest.

B. Significant Harm to Plaintiffs

As the Supreme Court held in *McCutcheon*, "[t]o require one person to contribute at lower levels than others . . . is to impose a special burden on broader participation in the democratic process." 134 S. Ct. at 1449. Moreover, "the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights." *Id*. (quoting *Davis*, 554 U.S. at 739).

Here, Plaintiffs face a unique constitutional harm. They wish to "robustly exercise" their First Amendment rights by fully contributing to the candidate of their choice—their party's nominee for office. Primary elections can be a source of tremendous waste, with incredible sums of money contributed to and spent by candidates who will not even enter the general election and truly stand for office. Plaintiffs have no desire to see their contributions wasted in this manner, preferring to support their party's ultimate nominees.

Despite years of efforts by political scientists and pollsters, there is no electoral crystal ball, and unless a candidate runs unopposed in the primary, Plaintiffs generally cannot know for certain who their party's nominee ultimately will be. As a result, absent the perfection of time travel, FECA prevents Plaintiffs from association with candidates in their preferred manner and for their intended purpose.

Given the lack of any relationship between the FECA provisions binding them and any *quid pro quo* anticorruption interest, FECA's bifurcated contribution limits are not closely drawn. Plaintiffs, accordingly, ought to be free to associate with candidates at a time of their own choosing.

C. The FEC Cannot Force the Court to Wear Blinders to Evade Constitutional Review

The FEC has insisted that the courts wear blinders to prevent constitutional review of FECA's effect here. JA 173 (district court characterizing this case as a facial challenge to the existence of contribution limits). The central question here is whether, having concluded that a donor can give up to $5,200 during the primary and general election periods without implicating the anticorruption interest, Congress can further control and constrict individuals' associational rights by forcing individual donors to split that $5,200 into smaller chunks and give up the right to donate the full amount unless they give in to the bifurcated scheme. The FEC cannot avoid this question by insisting that the courts look only at FECA's individual election limits and not the statutory system as a whole.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted) (internal quotation marks omitted), *superseded by statute as noted in Bullitt Fiscal Court v. Bullitt County Bd. of Health*, 434 S.W.3d 29, 39 (Ky. 2014).

That is, a court "must . . . interpret the statute as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into an harmonious whole." *Id.* (citations omitted) (internal quotation marks omitted); *accord Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 271 (D.C. Cir. 2001) (noting that traditional tools of statutory construction require examining context); *General Motors Corp. v. Nat'l Highway Traffic Safety Admin*, 898 F.2d 165, 170 (D.C. Cir. 1990) (noting that traditional tools of statutory construction require examining the "language and design of the statute as a whole" (citation omitted) (internal quotation marks omitted)). Thus, for example, a government could not escape constitutional review of a minor's life sentence after *Miller v. Alabama*, 132 S. Ct. 2455 (2012), by mandating 100 consecutive one-year terms for the same count, and then insisting that a court limit its analysis to the propriety of each one-year term.

Here, the individual election period limits must be examined in light of the statutory scheme as a whole, which includes repeated findings and acknowledgements by Congress and the Supreme Court that donors may give up to $5,200 without risk of *quid pro quo* corruption. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1452 (noting that "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption"). Indeed, the FEC itself has acknowledged that donors can give up to

$5,200 in a single check or during the same election period without risk of corruption. *See* 11 C.F.R. §§ 110.1(b)(5)(ii)(B) and 110.1(b)(3)(i).

CONCLUSION

Without doing anything to further the anticorruption interest, the bifurcated contribution limits "prohibit an individual from fully contributing to" his or her preferred candidates, "even if all contributions fall within the base limits"—that is, the "$5,200 each"—that "Congress views as adequate to protect against corruption." *McCutcheon*, 134 S. Ct. at 1448. Thus, for the reasons discussed above, Plaintiffs ask that the Court find the bifurcated contribution limits unconstitutional as applied to them, i.e., to donors who wish to give the full, non-corrupting $5,200 contribution to party nominees once they have won their primary elections.

Respectfully submitted,

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Dated: Aug. 15, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,839 words, according to a word count by Microsoft Word 2016, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Respectfully submitted Aug. 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, I electronically filed the foregoing Plaintiffs' Principal Brief with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

All participants in the case are represented by counsel of record who are registered CM/ECF users and will be served by the CM/ECF system. Service was made by CM/ECF on the following registered attorneys currently appearing in the case:

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